1989

Utah Department of Transportation v. Laygo Company, et al., J. D. Springer : Brief of Appellant

Utah Supreme Court

BRIEF

IN THE SUPREME COURT OF THE STATE OF UTAH

----ooOoo----

UTAH DEPARTMENT OF TRANSPORTATION,	:	
Plaintiff-Appellant,	:	
vs.	:	Case No. 890173
LAYGO COMPANY, et al., J. D. SPRINGER,	:	(Priority No. 10)
Defendants-Respondents	:	

----ooOoo----

BRIEF OF PLAINTIFF-APPELLANT

----ooOoo----

APPEAL FROM A JUDGMENT
OF THE SEVIER DISTRICT COURT
THE HONORABLE DON V. TIBBS
DISTRICT JUDGE

----ooOoo----

R. PAUL VAN DAM
Attorney General
ALAN S. BACHMAN
Assistant Attorney General
Attorneys for Plaintiff-
Respondent
124 State Capitol
Salt Lake City, Utah 84114
Telephone: (801) 537-1017

Tex R. Olsen
Ken Chamberlain
Kay L[illegible]
151 N[illegible] Main Street
Richf[illegible], Utah 84701
Telepl[illegible]: (801) 896-5441
Attor[illegible]r Defendants-Respondents

IN THE SUPREME COURT OF THE STATE OF UTAH

----ooOoo----

UTAH DEPARTMENT OF TRANSPORTATION,	:	
Plaintiff-Appellant,	:	
vs.	:	Case No. 890173
LAYGO COMPANY, et al., J. D. SPRINGER,	:	(Priority No. 10)
Defendants-Respondents	:	

----ooOoo----

BRIEF OF PLAINTIFF-APPELLANT

----ooOoo----

APPEAL FROM A JUDGMENT
OF THE SEVIER DISTRICT COURT
THE HONORABLE DON V. TIBBS
DISTRICT JUDGE

----ooOoo----

R. PAUL VAN DAM
Attorney General
ALAN S. BACHMAN
Assistant Attorney General
Attorneys for Plaintiff-Respondent
124 State Capitol
Salt Lake City, Utah 84114
Telephone: (801) 537-1017

Tex R. Olsen
Ken Chamberlain
Kay L. McIff
151 North Main Street
Richfield, Utah 84701
Telephone: (801) 896-5441
Attorneys for Defendants-Respondents

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES CITED

STATUTES CITED

IN THE SUPREME COURT OF THE STATE OF UTAH

----oo0oo----

UTAH DEPARTMENT OF TRANSPORTATION,	:	
Plaintiff-Appellant,	:	
vs.	:	Case No. 890173
LAYGO COMPANY, et al., J. D. SPRINGER,	:	(Priority No. 10)
Defendants-Respondents	:	

----oo0oo----

BRIEF OF PLAINTIFF-APPELLANT

----oo0oo----

APPEAL FROM A JUDGMENT
OF THE SEVIER DISTRICT COURT
THE HONORABLE DON V. TIBBS
DISTRICT JUDGE

----oo0oo----

INTRODUCTION

This Brief is based upon and very similar to the one filed by Stephen C. Ward, Assistant Attorney General, on behalf of the Utah Department of Transportation in regard to the cases wherein the Defendants are Walter M. Ogden, et al. and Rulon Lind and Flora S. Lind, his wife, et al. The purpose of this Brief is to relate the similar arguments to the cases wherein the Defendants are Laygo Company, et al. and J.D. Springer. These aforesaid four cases shall be referred to in this Brief as the "Ogden", "Lind", "Laygo" and "Springer" cases, respectively.

ISSUES PRESENTED ON APPEAL

1. Under the exigent facts of these cases in eminent domain, should the lower Court have changed the dates of valuation from the statutory date of service of Summons in October, 1987 to June of 1977?

2. Under the exigent facts of these cases, should the lower Court have changed when interest should commence to run from the dates the Order of Occupancy were granted in October, 1987 to June of 1977?

STATEMENT OF THE CASE

A. JURISDICTION AND NATURE OF THE CASE.

The Utah Supreme Court has jurisdiction to consider this matter as a result of the granting of a Petition for Interlocutory Appeal on May 23, 1989.

The Plaintiff-Appellant Utah Department of Transportation appeals from an order changing the statutory dates of valuation and when interest should run. The Plaintiff-Appellant Utah Department of Transportation filed condemnation actions in 1987 to acquire portions of the Defendants-Respondents' property to construct I-70 west of Richfield City. The Sevier District Court also granted the Plaintiff-Appellant's Orders of Occupancy in the Laygo and Springer cases and did so shortly after the cases were filed.

The dispute in this litigation involves the Sevier District Court changing the dates of valuation and when statutory interest should commence to run from October, 1987 to June, 1977.

B. DISPOSITION IN THE LOWER COURT.

The Laygo, Springer, Ogden and Lind cases have not been consolidated for trial, but have only been consolidated for the purpose of determining the dates of valuation and when interest should commence to run. A nonjury trial was held before Judge Don V. Tibbs on March 9, 10, and 13, 1989 and orders fixing the dates of valuation and when interest should commence to run were entered April 10, 1987. (Laygo R-221-224, Springer R-215-218)

The Plaintiff-Appellant by this appeal seeks to have the foregoing orders reversed and to have the Utah Supreme Court order the dates of valuation and when interest should commence to run to be 1987.

C. STATEMENT OF THE FACTS.

The Defendants-Respondents Laygo and Springer in these two cases each owned property which was needed for the construction of I-70 in the area located west of Richfield, Utah. (Laygo R-1, Springer R-1) The Defendants-Respondents were served with Summons on the following dates:

a. Laygo - October 15, 1987. (R-17-19)

b. Springer - October 7, 1987. (R-19-21)

The Plaintiff-Appellant tendered into Court its approved appraisals and secured uncontested Orders of Occupancy from the above-entitled Court on October 28, 1987. (Laygo R-21-27 and Springer R-23-28)

The Defendants-Respondents withdrew the approved appraisal amounts which previously had been tendered into Court by the Plaintiff-Appellant without raising any issue with respect to either the Court's ordering different dates of valuation or the commencement of interest to run. (Laygo R-27, Springer R-28)

On January 19, 1988, the Laygo Defendants-Respondents filed their Answer with the Court. On October 21, 1987, the Springer Defendants-Respondents filed their Answer with the above-entitled Court. (Laygo R-29-31, Springer R-16-18) In

neither of the Defendants-Respondents' Answers did they raise any issue with respect to this Court ordering different dates of valuation or the commencement of interest to run.

Interrogatories were served on the Defendants-Respondents by the Plaintiff-Appellant on January 12 (Springer) and 14 (Laygo) 1988, which to this date have remained unanswered. (Laygo R-32, Springer R-30)

A pretrial was held on each of these cases before the above-entitled Court on the 6th day of July, 1988. (Laygo R-33-34, Springer R-31) Plaintiff-Appellant's counsel was directed to prepare the Pretrial Order. Neither of these two Defendants-Respondents raised any issue or concern during the pretrial hearing with respect to having this Court order different dates of valuation or the commencement of interest to run. (Laygo R-173-176, Springer R-171-174)

Copies of the proposed Pretrial Order were sent to Defendants-Respondent's counsel to approve as to form on July 15, 1988. (Laygo R-173-176, Springer R-171-174)

Defendants-Respondents' counsel neither approved the Pretrial Orders as to form nor submitted the Orders to the Court for execution. (Laygo R-173-176, Springer R-171-174)

On July 18, 1988, the Plaintiff-Appellant submitted to the Defendants-Respondents a list of its potential witnesses and Exhibits. The Defendants-Respondents have failed to submit their lists of witnesses to the Plaintiff-Appellant. (Laygo R-37-38,

Springer R-35-36)

In 1977, the Utah Department of Transportation approved the alignment of I-70 to be west of Richfield, but did not receive its funding until December 20, 1985. (Laygo R-48, Springer R-46) In the meantime, between 1977 and 1985 when the project became funded, UDOT would have been making its final design in relation to each individual property owner involved. The properties involved would not have been ready to acquire until 1985. (Laygo R-91, Springer R-89)

On March 18, 1977, UDOT completed its Environmental Impact Statement and on June 22, 1977, secured Federal Highway Administration approval. (Laygo R-91, Springer R-89)

In the past UDOT may have argued against Richfield City approving any development in the proposed interstate corridors, but the final decision has always rested with Richfield City. (Laygo R-91, Springer R-89) There is no evidence in the record that Richfield City actually adopted any law or regulation that prohibited development in the proposed interstate corridor.

It was the testimony of the Plaintiff-Appellant's MAI real estate appraiser that with respect to the Defendant-Respondents Springer that this property was too costly to develop in 1977 as well as in 1987. (Tr. 407-411) Larger waterlines would be needed for subdivision of the Springer property and there is no sewer. (Tr. 409) Septic tank approval would not be allowed on the Springer property due to the presence of a nearby

spring. (Tr. 409-410) The cost of all utilities and the sewer/septic tank problems, led the State's expert appraiser to conclude that the highest and best use of the Springer property to be "horse belt" in both 1977 and 1987. (Tr. 410-411)

The State's expert appraiser testimony by Mr. Lang, MAI, indicates that the Laygo property would be capable of being subdivided into the same number of lots (19) both in the "before interstate condition" and the "after interstate condition". This is because the lots that have property taken by the project are deeper than necessary under the City of Richfield's zoning requirements. (Tr. 413-415)

Mr. Lang further testified that the lot prices would have been lower in 1977 than in 1987. (Tr. 420)

Mr. Pete Monson, UDOT District Preconstruction Engineer, testified that the amount of Laygo property that could be taken by the relocation of the canal was limited by the location of a nearby City spring and pump house. (Tr. 432-433)

Mr. Monson also testified that he had been approached by one of the Laygo property owners about five or six years ago to delineate an approximate location for the shifting of the canal (the take to occur) on the Laygo property, but that such request was withdrawn. (Tr. 435)

Mr. Kay McIff who was the Defendants-Respondents' attorney of record up until a few days before trial, was the only witness (other than parties) called by the Defendants-Respondents

during the trial. (Laygo 39-40, Springer 37-38) Mr. McIff testified he had a direct pecuniary interest in the outcome of the case, and was not an independent witness. (Tr. 221) Mr. McIff did not know the number of lots available for sale in the Richfield area in 1977. (Tr. 214) Mr. McIff testified that he could not ascertain in 1977 that the Defendants-Respondents' properties were going to be impacted with the construction of I-70 because there was no final design of I-70. (Tr. 218)

Mr. McIff made no explanation of the costs involved in the presentation of Defendant-Respondents case in chief to bring utilities to the Defendant-Respondents' properties. (Tr. 223 and Tr. 257 wherein Mr. McIff indicates that his answer would be basically the same for the "Springer" parcel as he had answered for the northern "Lind" parcel since the Springer parcel is just north of the northern Lind parcel)

Mr. McIff had not conducted a "vacant buildable lands inventory" nor studied the number of available homes for sale. (Tr. 259)

Mr. McIff indicated that the City of Richfield did "not per se" adopt any law restricting development within the corridor of the freeway. (Tr. 261)

There is no evidence in the record that Springer or Laygo attempted to develop their properties, such as updated platting or seeking building permits. This would include the portion of the Laygo property that was separated by another road

from the proposed interstate had not been subject to a building permit or updated platting.

There is no evidence in the record that Laygo or Springer or anyone challenged the City's supposed policy of denying development within the proposed interstate corridor without having adopted regulations through lawful process.

Mr. McIff acknowledged that the final design and funding for the construction of I-70 in the area of the subject property did not come until 1985. (Tr. 246-249)

SUMMARY OF ARGUMENT

The time of valuation is presumed to be the date of service of summons. UDOT v. Friberg, 687 P.2d 821 (Utah 1984) provided an exception to this rule where values had substantially changed over a period of time and other circumstances warrant such a change in the date. The Friberg case would not support such a change of value in the subject cases since the circumstances are not at all similar and, in any event, there has not been a substantial change in values from the date of service of summons to the date requested by Defendants-Respondents.

If the Defendants-Respondents were correct in asserting that there properties were "held hostage" since 1977 by governmental action, then a cause of action accrued then which would now be barred by any applicable statute of limitations and the Governmental Immunity Act. The Defendants-Respondents did not

pursue such a claim in a timely manner, did not send notice under the Governmental Immunity Act, did not raise it in their answers to the subject complaints, did not raise it at the hearing on the subject motions for immediate occupancy, and did not raise it prior to withdrawing the funds deposited with the Court upon granting of the subject motions for immediate occupancy. To allow such a claim in the untimely manner that Defendants-Respondents have done, places governments in an extremely difficult position in pursuing public projects.

The subject properties were not "held hostage" by governmental action in 1977. The landowners did not pursue development of the property, even to the extent that would have been compatible with the proposed interstate.

In any event, UDOT would have been prevented from instituting eminent domain proceedings in 1977 because funding for the project was not available until December, 1985. Salt Lake County v. Ramoselli, 567 P.2d 182 (Utah 1977). The State of Utah should not be subject to an earlier valuation date than the service of summons when the Supreme Court of Utah determines that such earlier date is premature for the exercise of eminent domain due to lack of funding.

In 1981, the Utah Legislature passed Utah Code Ann. § 78-34-19 which discourages government from premature condemnations. It would also subject the State of Utah to stiff penalties if condemnation actions had been filed in 1977, as it

would have been very premature, as funding was not even assured.

The Defendants-Respondents should only be entitled to interest from the date of the applicable immediate occupancy order since UDOT did not possess or occupy the properties before that time. Additionally, the immediate occupancy orders make no reference to any change in the interest calculation. The mere announcement of a project (which occurred here in 1977), is an illogical date to award interest from since it would give the property owner a windfall as they would also be entitled to compensation for any improvements they made to their property up until the time of service of summons.

In any event, the Defendants-Respondents should not be allowed to pursue an alternate valuation date or interest date when they have withdrawn the funds deposited with the District Court. The alternate date is clearly a defense to a condemnation action that is different from just requesting additional compensation. Requesting a different date is certainly substantially different in prosecuting and defending an eminent domain case, than merely alleging that the defendant should be entitled to greater compensation under the subject complaint. In fact, requesting an alternate date is the functional equivalent of a counterclaim for inverse condemnation, which is certainly different from merely requesting greater compensation under an answer to a complaint.

The District Court clearly erred in allowing testimony

relative to the highest and best use that was based upon speculative assemblage of certain of the properties.

ARGUMENT

POINT I

UTAH CODE ANN. § 78-34-4 (1987) CREATES A PRESUMPTION THAT IN AN EMINENT DOMAIN ACTION, THE TIME OF VALUATION IS THE DATE OF THE SERVICE OF SUMMONS.

Utah Code Ann. § 78-34-4 (1987) fixes the date of the service of summons for the purpose of determining just compensation:

> For the purpose of assessing compensation and damages, the right thereto shall be deemed to have accrued at the date of the service of summons, and its actual value at that date shall be the measure of compensation for all property to be actually taken, and the basis of damages to property not actually taken, but injuriously affected, in all cases where such damages are allowed, as provided in the next preceding section [§ 78-34-10]. No improvements put upon the property subsequent to the date of service of summons shall be included in the assessment of compensation or damages. [Emphasis added]
>
> [Utah Code Ann. § 78-34-4 (1987)]

The Defendants-Respondents cite the case of UDOT v. Friberg, 687 P.2d 821 (Utah 1984), as authority for changing the date of valuation in an eminent domain case. A close reading of the facts in the Friberg case will easily distinguish it from the Defendants-Respondents case.

In the Friberg case, UDOT actually filed an action in eminent domain in 1972 to acquire a portion of the Defendants'

property. Shortly thereafter, at the hearing on the Motion for an Order of Immediate Occupancy, the Defendant landowners declined to withdraw the Plaintiff's appraisal which previously had been deposited into Court.

The Fribergs also reserved the issue of the Plaintiff's right to acquire the property. The trial on the issue of just compensation was delayed for seven years because of two federal lawsuits. During this seven year period of time, Salt Lake City land values substantially increased.

The Supreme Court in the Friberg case, because of the delay after the Complaint had been filed, and the fact that land values in Salt Lake City had substantially increased, changed the date of valuation to 1979. The Court in doing so added the following caution: "Suffice it to state that valuation as of the service of summons date will be the rule, and departure from that rule will be the exception." 687 P.2d at 832.

Justice Oaks in his concurring opinion concluded the Fribergs did not abandon their right to litigate the question of the date of valuation because they did not withdraw the $80,000 that had previously been deposited pursuant to the Order of Immediate Occupancy. Justice Oaks concluded that the date of valuation was only decided when the State's right to condemn was decided by the Court. The State's right to condemn was not established until December, 1979.

Utah Code Ann. § 78-34-9 (1987) states the following:

> The rights of the just compensation for the land so taken or damaged shall vest in the parties entitled thereto, and said compensation shall be ascertained and awarded as provided in § 78-34-10 and established by judgment therein, and the said judgment shall include, as part of the just compensation awarded, interest at the rate of 8% per annum on the amount finally awarded as the value of the property and damages, from the date of taking actual possession thereof by the plaintiff or order of occupancy, whichever is earlier, to the date of judgment; but interest shall not be allowed on so much thereof as shall have been paid into court. Upon the application of the parties in interest, the court shall order the money deposited in the court be paid forthwith for or on account of the just compensation to be awarded in the proceeding. A payment to a defendant as aforesaid shall be held to be an abandonment by such defendant of all defenses excepting his claim for greater compensation. [Emphasis added]

The Friberg case expressly disallows the Defendant landowners a different valuation date if the order of occupancy is granted and the landowners withdraw the approved appraisal from the Court.

The Defendants-Respondents on Page 18 of their Memorandum state the following:

> "If the (Richfield) market would have continued to improve (from 1977). Defendants would have been uninjured." (Laygo R-60, Springer R-58)

These Defendants-Respondents seem to be proposing that anytime between the announcement of a corridor for a proposed road occurs and when the service of summons happens the landowner can choose their date of valuation when real estate values are the highest. How anxious would the Defendant-Respondent landowners be willing to change the date of valuation from

1986 to 1977 if real estate values had continued to increase?

The Defendants-Respondents in their brief refer to the case of UDOT v. Partington, Civil No. 10129 which was recently tried in the District Court of Sevier County. It is interesting to note that the appraisers hired by the Defendant landowners testified to a price per acre of $17,500. Mr. Kay McIff was the attorney of record. The Partington property is located in close proximity to the subject properties.

Page 83 of the Transcript of the testimony of Mr. John Brown, the appraiser hired by the Partingtons, states as follows:

> Partington valuation date was 1987.
>
> Sale No. 1: February, 1980 5.1 acres.
> Sale price: $67,830.00 - $13,300 per acre
> 50 percent adjustment for location
> 10 percent for size
> Total add on adjustment per acre was $4,655.00
> Per acre value was $17,955.00
>
> Seller Wallace Sorenson
> Buyer Hal Ward
> Located at 300 East in Richfield, Utah.
>
> Sale No. 2:
>
> Located off 5th East and 8th North Richfield City - 15.28 acres
> Sorenson Estates was the Seller
> Brush Wellman was the Buyer
> Sale price: $121,467.00
> Price per acre $7,947.00
> Adjusted price $16,690.00
> No sales date listed
>
> Sale No. 3:
>
> Location at 11th West and 520 South Richfield City
> Sale date 1981
> Seller Darral Croft

Buyer Craig Anderson
Sale price $52,500.00
Per acre value $10,500.00
30 percent plus adjustment
Net adjustment of $7,350.00
Adjusted value of subject $17,850.00

Sale No. 4:

Sale date January 1983
Seller Richfield Land
Buyer Khoesrow
9.36 acres in located North of Richfield City Golf Course
Total sale price $11,431.00
Total adjustments $7,143.00
Adjusted value of subject property $18,574.00

Sale No. 5:

Seller Labrum Investment
Buyer Gordon - Sale date August, 1988
North of Richfield City Golf Course
1.07 acres
$30,000.00 sale price
Per acre value of $28,037.00
50 percent adjustment for size
Adjusted price of subject property
$19,627.00 (Laygo R-76, 98-99, Springer R-74, 96-97)

Mr. Brown made no adjustments for time on any of his sales. The sales ranged from February, 1980 to August, 1988.

The Partington property is located west of Richfield City and in close proximity to the Laygo and Springer properties. The Partington case used the service of summons date of valuation of 1987. In Paragraph 26 on Page 11 of the Defendant's memo, the Defendants use a figure of $13,500 as the value of what the Laygo and Springer property should be. (Laygo R. 53, Springer R. 51) It is interesting that with a 1987 valuation date, the appraiser

in the Partington case used a figure of $17,500 as the value of the property taken.

POINT II

THAT PLAINTIFF-APPELLANT UDOT ACTED IN ACCORDANCE WITH EMINENT DOMAIN LAW IN THE ACQUISITION OF THE DEFENDANTS-RESPONDENTS' PROPERTY.

Any reference in the Defendants-Respondents' Memorandum on file with the Trial Court relating to the announcement of and/or proposed completion dates is based upon newspaper articles which are one of the rankest forms of hearsay evidence that exists. (Laygo R-46-47, Springer R-44-45) The foregoing is merely the opinion of the newspaper in regard to when the completion date of I-70 might be. City of Cheyenne v. Frangos, 487 P.2d 804 (Wyo. 1971).

The Defendants argue on Page 22 of their brief the following (Laygo R-64, Springer R-62):

> Defendants do not claim the creation of a cause of action against either Federal or State authorities, nor do they impugn their integrity.

These Defendants-Respondents argue they should be allowed to choose their date of valuation as any date between the time of the announcement of the corridor of I-70 and when the service of summons actually takes place. The foregoing reasoning is flawed and without legal precedence. The landowners in this case choose 1977 because at first glance this appears to be the time that Richfield City granted the highest number of building permits. (Laygo R-49, Springer R-47)

The problem being there is no cause and effect relationship between 1977, the year that Richfield City granted the highest number of building permits and the proposed announcement of the I-70 corridor. (Tr. 210) There is evidence that as early as 1970, that UDOT preliminary approved the present corridor. The Defendants-Respondents have made no correlation between the demand for building permits in 1977 and how many building lots were offered for sale. (Tr. 214)

The real problem with the foregoing reasoning of the Defendants-Respondents lies arguendo in the fact that if their property was taken or damaged in 1977, they were then obligated to pursue their legal remedies as outlined in the case of Walton v. UDOT, 558 P.2d 609 (Utah 1976). In the Walton case, UDOT regarded a public street in the Summit Park subdivision to create a better street for cars to travel on during the temporary construction of I-80. The landowners felt by UDOT altering this access their property had been taken and/or damaged. The landowners instituted an action against UDOT to recover damages resulting from the alleged alteration of their access. The Utah Supreme Court ruled the Plaintiff had an action in law and is thus governed by the Governmental Immunity Act and the limitation of actions.

The Defendants-Respondents have obviously failed to comply with any applicable statute of limitations and must be precluded from raising such a claim beyond such limitation

period. For instance, Utah Code Ann. § 78-12-36(1) (1987) provides a three year statute of limitations for "trespass upon or injury to real property" and Utah Code Ann. § 78-12-25(2) (1987) provides for a four year statute of limitations where one is not otherwise provided by law.

If, as the Defendants-Respondents in the case at bar allege, that a taking and/or damaging of their property occurred in 1977, the holding of the Walton case would require compliance with the waiver of Immunity Act. Utah Code Ann. § 63-30-12 (1953), bars a claim under the Governmental Immunity Act unless written notice is filed with the Utah Attorney General and the agency concerned within one year after the cause of action arises. The Plaintiffs in the Walton case and the Defendants-Respondents in the case at bar failed to allege the foregoing. The Defendants in the case at bar are now precluded from alleging a taking and valuation of their property that may have occurred in 1977.

As set forth in the Statement of Facts, the funding for this particular project was not available to UDOT until December, 1985. (Tr. 246, 249)

The foregoing raises a problem which was dealt with in the case of Salt Lake County v. Ramoselli, 567 P.2d 182 (Utah 1977). Surprisingly enough, the Ramoselli case was decided the same year as the current Defendants-Respondents want as their date of valuation. In the Ramoselli case the Plaintiff Salt Lake

County was precluded from condemning the Defendant's property because there were no funds in existence in Salt Lake County to develop the property to the use specified in the Plaintiff's Complaint. The Supreme Court felt because said funding was not present, that Salt Lake County failed in its burden of proving need or public necessity and that the attempted condemnation was a clear abuse of discretion. Under the facts of the Ramoselli case, the Plaintiff-Appellant in the cases at bar would have been precluded from condemning the Defendants-Respondents' property before they had the funding in place to commence the construction of I-70 in the area of the Defendants-Respondents' property. The foregoing only applies to situations of eminent domain and not voluntary advance acquisitions.

The problems raised immediately above were exacerbated in 1981 when the Utah Legislature passed Utah Code Ann. § 78-34-19 (1987) which states as follows:

> 78-34-19. Action to set aside condemnation for failure to commence or complete construction within reasonable time.
>
> (1) In an action to condemn property, if the court makes a finding of what is a reasonable time for commencement of construction and use of all the property sought to be condemned and the construction and use is not accomplished within the time specified, the condemnee may file an action against the condemnor to set aside the condemnation of the entire parcel or any portion thereof upon which construction and use was to have taken place.
>
> (2) In such action, if the court finds that the condemnor, without reasonable justification, did not commence or complete construction and use within the time specified, it shall enter judgment fixing the

> amount the condemnor has paid the condemnee, as a result of condemnation and all amounts due the condemnee as damages sustained by reason of condemnation, including damages resulting from partial completion of the contemplated use, plus all reasonable and necessary expenses actually incurred by the condemnee including attorney fees.
>
> (3) If amounts due the condemnee under Subsection (2) of this section exceed amounts paid by the condemnor, or these amounts are equal, judgment shall be entered in favor of the condemnee, which judgment shall described the property condemned and award judgment for any amounts due condemnee. A copy of the judgment shall be filed in the office of the county recorder of the county, and thereupon the property described therein shall vest in the condemnee.
>
> (4) If amounts paid by the condemnor under Subsection (2) of this section exceed amounts due the condemnee, judgment shall be entered describing the property condemned and giving the condemnee 60 days from the date thereof to pay the difference between the amounts to the condemnor. If payment is made, the court shall amend the judgment to reflect such payment and order the amended judgment filed with the office of the county recorder of the county, and thereupon the property described therein shall vest in the condemnee. If payment is not made, the court shall amend the judgment to reflect nonpayment and order the amended judgment filed with the county recorder of the county.

Basically, the trial court can set a reasonable date in which construction of the contemplated project should commence. Also, a rather stiff penalty is imposed on the condemnor for failure to comply.

In the case at bar, if the condemnation were commenced before the contemplated project was fully designed and funded, the Plaintiff-Appellant UDOT could subject itself to rather stiff penalties. The foregoing shows the intent of the legislature to

not acquire private property before such time as the condemnor can physically use the condemned property. Under the rational of the Ramoselli case and Utah Code Ann. § 78-34-19 (1987), Plaintiff-Appellant UDOT would have been precluded from acquiring by eminent domain the Defendants-Respondents' property in 1977. Also, under the rational of the Walton case, the statute of limitations has now run on the Defendants-Respondents alleging a taking and/or damaging of their property in 1977.

POINT III

THE DEFENDANTS-RESPONDENTS ARE ENTITLED TO STATUTORY INTEREST FROM AND AFTER THE GRANTING OF AN ORDER OF IMMEDIATE OCCUPANCY.

The applicable State statute regarding the payment of interest in eminent domain cases is found in Utah Code Ann. § 78-34-9 (1987) which reads as follows:

> . . . The rights of the just compensation for the land so taken or damaged shall vest in the parties entitled thereto, and said compensation shall be ascertained and awarded as provided in § 78-34-10 and established by judgment therein, and the said judgment shall include, as part of the just compensation awarded, interest at the rate of 8% per annum on the amount finally awarded as the value of the property and damages, from the date of taking actual possession thereof by the Plaintiff or order of occupancy, whichever is earlier, to the date of judgment . . . [Emphasis added]

The Court in the Laygo and Springer cases granted the Plaintiff-Appellant an Order of Immediate Occupancy on October 28, 1987. The two Orders of Occupancy do not contain any reservation whatsoever that interest should be computed in any

other manner than that described in the statute referred to above.

It is interesting to note that the case of City of So. Ogden v. Fujiki, 621 P.2d 1254 (Utah 1980) was cited as authority in the case of UDOT v. Friberg, 687 P.2d 821 (Utah 1984). There is no mention whatsoever of the Friberg case overruling, superseding or modifying in any way the Fujiki case. There is absolutely no legal justification for the Defendants-Respondents assertion that the Fujiki case is "of questionable validity" because of the Friberg case. (Laygo R-65, Springer R-63) The only reason for the Defendants-Respondents' statement is that the holding in the Fujiki case is directly contrary to the position these Defendants-Respondents now want this Court to adopt. In the Fujiki case, the City of South Ogden filed its Complaint to acquire a portion of the Defendants' property. The City of South Ogden, in its Complaint, referred to their application for an Order of Immediate Occupancy, but never applied for an Order from the Court. In between the filing of the original Complaint and the date Judgment was entered, neither the City nor the Defendants occupied the property sought to be condemned. The Utah Supreme Court held that the City did not occupy the property in question and therefore interest should only run from the date the final Judgment was entered.

The Friberg case cited as authority on Page 835 and followed the holding of the Fujiki case and only allowed the

Fribergs' interest on the award from the date of the Fribergs' abandonment of the property. The obvious rational being that as long as the Fribergs were occupying their home, which was located on the property sought to be condemned, that UDOT could not occupy the Defendants' property and therefore would not be obligated to pay interest.

Similar issues raised by the Laygo and Springer Defendants-Respondents were considered and decided in the case of State v. Peek, 1 Utah 2d 263, 265 P.2d 630 (1953). In the Peek case, the Defendants argued the service of summons effectively interfered with the use of their property and therefore was an unconstitutional taking without the payment of just compensation. That service of summons practically eliminated any possibility for the sale of their property. The Utah Supreme Court held the Defendants in the Peek case were not entitled to interest on the Judgment prior to the time actual possession was taken. There is more of a taking involved with the service of summons than with a corridor announcement because no improvements put on the property thereafter will be paid for. As noted above, the Utah Supreme Court only allowed interest from the date of actual possession by the condemnor.

The case of State v. Bettilyon, 17 Utah 2d 135, 405 P.2d 420 (1965) dealt with the issue of what constitutes a "taking of actual possession" of property. In the Bettilyon case the landowners applied to Salt Lake County for approval of a

subdivision, but upon the request of UDOT the County deferred the approval of the subdivision because UDOT expected to use some of the proposed subdivision property for highway construction. The Utah Supreme Court held this did not constitute a taking and condemnees were not entitled to recover expenses incurred thereafter or interest from the date of deferment. The facts in the Bettilyon case are much stronger in that neither the Laygo nor Springer Respondents-Defendants ever applied for any proposed development of their property, including a portion of the Laygo property which was separated by a road from any proposal for the interstate. The Springer property had a highest and best use of horse belt either with or without the freeway, either in 1977 or 1987, due to the high costs in either scenario of bringing urban services to the property. (Tr. 411) The Laygo property could have only a limited portion taken in 1977 or 1987 due to the location of a nearby spring and pump house that was to be preserved and, in any event, the property owners withdrew their effort with UDOT to delineate the approximate location of the proposed relocation of the canal that would result from the interstate project. (Tr. 432-438) Consequently, there is no taking by UDOT of the Defendants-Respondents Laygo and Springer properties so as to cause interest to run.

A case from the State of Nevada supports the conclusion that there was insufficient governmental intrusion in the Springer and Laygo cases to support Defendants-Respondents

claims. (Of course, if there was such a claim available then, the statute of limitations and governmental immunity statutes would have barred such a claim now, as discussed previously in this brief). In Sproul Homes of Nevada v. State Ex. Rel. Dept. of Highways and County of Clark, 611 P.2d 620 (1980), the Nevada Supreme Court held that certain precondemnation activities did not give rise to an inverse condemnation action, which is really the essence of Defendants' claim herein desiring an earlier valuation date. In Sproul Homes, the complaint alleged that the State indicated a need to construct a portion of U.S. 95 Expressway, that the State discussed with the landowners the intention of the State to acquire a large portion of their land, that the State entered the land for purposes of a survey and appraisal, and that the landowners could not obtain building permits to construct improvements on the subject property. In fact, the Clark County Board of Commissioners approved a zone change on the subject land with the condition "'that no development will take place on the triangular portion of property bound by the proposed freeway...'". Sproul Homes, supra at 621.

The Nevada Supreme Court held that the mere planning of the project, studying and surveying the land in light of no showing of a physical invasion of the land or finality of the acquisition of the subject property by the State, did not give rise to an inverse condemnation claim. The Court found that the State had placed no legal or physical obstacles on the

development of the property and therefore no "precondemnation" had occurred.

The facts in the Sproul Homes case were actually much closer to establish governmental intrusion that the case at hand. Nevertheless, the Sproul Homes case and the case at hand both involve situations where the project had not been finalized at the time the landowners claim a condemnation occurred. To the extent there was any precondemnation obstruction of development in the proposed highway corridor, it was the result of actions by the City of Richfield and not the State. (Laygo R-91, Springer R-89) Nevertheless, there is no evidence in the record that the City of Richfield denied any development on the subject properties.

POINT IV

THE VALUATION DATE IS CONSIDERED A DEFENSE TO A CONDEMNATION ACTION AND IS ABANDONED WHEN THE DEFENDANT LANDOWNER WITHDRAWS THE PLAINTIFF'S DEPOSIT.

Utah Code Ann. § 78-34-9 (1987) deals with the issue of when a Defendant landowner abandons their defenses to a condemnation action. The pertinent part of the statute reads as follows:

> Upon the application of the parties in interest, the court shall order the money deposited in the court be paid forthwith for or on account of the just compensation to be awarded in the proceeding. A payment to a Defendant as aforesaid shall be held to be an abandonment by such Defendant of all defenses excepting his claim for greater compensation. [Emphasis added]

As noted above, the Plaintiff tendered into Court the full amounts of its approved appraisals and the deposited funds were shortly thereafter withdrawn by each of the Defendant-Respondents. The Defendants-Respondents by their withdrawal abandon all "defenses" to the Plaintiff-Appellant's action in eminent domain, except their claims for greater compensation.

The statute seems to differentiate between "defenses" and claims for greater compensation. The argument which the Defendants-Respondents raise in their memo that "valuation date" and "greater compensation" are synonymous is totally absurd and without legal recognition. (Laygo R-68, Springer R-66)

Justice Oaks in his concurring opinion in the case of UDOT v. Friberg, 687 P.2d at 836 stated the following:

> While I share the dissent's view that the best interests of all concerned dictate that the State's right to take by eminent domain be resolved as soon as possible, property owners who do not abandon their defenses in the manner specified in § 78-34-9 (withdraw the Plaintiffs' deposit) must have an opportunity to litigate them. Either party can bring that issue on for decision, with or without a simultaneous determination of "damages" (compensation). Because that was not done in the case (withdrawal of the Plaintiffs' deposit) the effect was to postpone the date for the determination of value (compensation), as explained below. (Explanation in parenthesis added by this writer.)

Justice Oaks goes on his opinion and equates the "State's right to condemn" and "date of valuation" as defenses which are waived and conceded by the Defendant landowners when an Order of Immediate Occupancy is granted and the Defendant

landowners withdraw from the Court the condemnors' deposit.

The foregoing is also adhered to in the case of Redevelopment Agency of Salt Lake City v. Tanner, 740 P.2d 1296 (Utah 1987). The Tanner case cites the UDOT v. Friberg case as follows:

> The parties entered into a stipulation that was incorporated into an order establishing the State's right to condemn and reserving for later determination the amount of compensation to be awarded and the date for assessing valuation. Tanner, 740 P.2d at 1300.

The Court in the Tanner case held that once a property owner chooses to withdraw the money deposited by the State in obtaining the Order, he waives all objections and defenses to the action and to the taking of his property, except any claim to greater compensation. The Court went on to hold that by the Defendants-Respondents withdrawing the monies, the Plaintiff-Appellant acknowledged that the condemnor had met all of the jurisdictional requirements.

In the present case, to allow the Defendants-Respondents to now contest the valuation date would be to sanction abuse. To allow the Defendants-Respondents to depart from the rule set forth in Utah Code Ann. § 78-34-9 (1987) is to invite controversy in every condemnation case and afford a means for parties to manipulate the measure of compensation, which the statutory provisions attempt to prevent. If the Defendants-Respondents wished to have contested the valuation date, they should have raised it in their response to the Complaint and

should have not withdrawn the immediate occupancy deposit.

POINT V

THE DEFENDANTS-RESPONDENTS' EXPERT WITNESS, MR. KAY McIFF (WHO WAS THEIR PRIOR ATTORNEY) ERRED WHEN TESTIFYING CONCERNING THE POSSIBLE DEVELOPMENT OF THE SPRINGER PROPERTY BECAUSE HE RELIED UPON IT BEING ASSEMBLED WITH ADJOINING PROPERTIES.

Mr. McIff's testimony relative to the highest and best use and development of the Springer property in 1977 was predicated on it being assembled into a roughly 20 acre tract total. (Tr. 499)

"A. Assemblage is kind of the reverse of subdivision. It's appraising a parcel of property in conjunction with other properties with which it may be joined for a common utilization.

Q. Talking about consolidation?

A. Consolidation. And you employ it where that kind of consolidation or assemblage would be mutually advantageous and help realize the highest and best use out of that property.

Q. Is assemblage a common phenomenon in the development of real property where there is no unity of title as Mr. Ward correctly observed? Is it a common phenomenon? Is it a thing that is commonly done in marketing properties for residential purposes? Have you done it?

A. Yes. And I think it's essential to do in some instances to realize the highest and best use of property. It's frequently done in putting together packages for commercial construction, or for residential construction as in my

experience.

Q. And isn't it just as simple as going to the individuals who own the served or segregated title and showing them the economics of an assemblage and establishing, I mean showing them in their minds that it's the best of use that they can put to are their property?

A. Yes.

Q. And that relates to the highest and best use, does it not?

A. It does.

Q. Did you make an investigation concerning assemblage of the Springer, the Lind property, with other properties?

A. I did.

Q. What investigation did you make?

A. May I step down, Your Honor?

THE COURT: Sure.

[WITNESS RESPONDED]

WITNESS: A. I previously testified that the Lind and Springer properties--

[INDICATED]

--were part of a roughly 20-acre tract, located west of what is now Plat-J and that that tract, as a whole, was suitable for residential development. The ownerships, in my investigation, revealed the ownership by Lind, and then between Lind and Springer by Krofts. Mr. Lind already testified that he had an

agreement with Krofts to join together in an effort to--

MR. WARD: Your Honor, I would object to that. I don't remember hearing that at all.

MR. CHAMBERLAIN: Yeah. He did. He said that.

MR. WARD: Well, let's see the agreement, then. Let's see the agreement. The best evidence would be the agreement itself, Your Honor. Let's see it.

THE COURT: I really don't remember it. Do you have an agreement?

WITNESS: A. No, Your Honor. His testimony in conjunction with the EXHIBIT NO. 36, the plat, that it contemplated a joint development with the Krofts.

MR. WARD: Your Honor, that was drawn merely to show how property might be developed. There's no agreement attached to that.

THE COURT: Well, the objection is sustained. I don't remember that.

MR. CHAMBERLAIN: Well, it's either in the record or it isn't.

THE COURT: As I remember that, that was how he would get down to his property. That's how I remember it.

MR. CHAMBERLAIN: I'm sorry. You're right, Your Honor.

THE COURT: The objection is sustained.

MR. CHAMBERLAIN: Q. What other investigation did

you make concerning the principal of assemblage?

A. Mr. Lind's property. Then there was the Krofts property, and at least my investigation and on which I premised my opinion was that Krofts were agreeable to the assemblage concept.

MR. WARD: Objection, Your Honor. How could he tell what Krofts may or may not be willing to do, Your Honor? It's hearsay.

MR. CHAMBERLAIN: I think it falls into the same category as--

THE COURT: Well, I don't think he can, either. I grant that. But I think what he's trying to do is say there's a possibility of development in a particular way that could have taken place, and I believe that's all you're getting to." [Emphasis added]

The foregoing opinions were contrary to law, speculative and totally without foundation.

The Utah Supreme Court has spoken directly to the issue of projected use as it relates to the value of property in a condemnation action. The court stated that the projected use must be more than possible, it must be reasonably probable and go beyond the realm of mere speculation of what might happen sometime in the unknown future. State v. Jacobs, 16 Utah 2d 167, 397 P.2d 463 (1964).

Even though the Jacobs court found that the admission

of this sort of evidence is within the sound discretion of the trial judge, the judge in this case allowed the opinion to come in without any sort of support or foundation, clearly in opposition to the directives of the Utah Supreme Court.

Furthermore, the United States Supreme Court has given its direction on the precise issue of this case. In Olson v. United States, 292 U.S. 246 (1934) the Court affirmed the admissibility of evidence on the possibility of combining the condemned parcel with other properties for the highest and best use. The Court then stated that if such a combination of properties is not a reasonably probable occurrence, the evidence should be excluded as "mere speculation and conjecture", because courts do not use such things in their search for truth. 292 U.S. at 257. See also, United States ex rel. T.V.A. v. Powelson, 319 U.S. 266 (1942), (affirming the idea that there must be a reasonable probability of the land combination or else the mere possibility is too remote and speculative.), United States v. 70.39 Acres of Land, etc., 164 F. Supp. 451 (S.D.Cal. 1958), (the opinion of an expert will not be heard on the issue of how probable the combination is; facts are necessary for that determination).

In the present case, The only way that the Springer property could ever be used for the development of a subdivision would be to combine that one acre parcel with the surrounding 19 acres, which Springer does not own. Mr. McIff presented no facts

or agreements to support the possibility of the combinations of the lands in question. In fact, he admitted to the court that he did not have an agreement for the combination of lands. (Tr. 502) His entire testimony, therefore, was based on his opinion as to what might happen sometime in the undetermined future. Courts have, as a rule, excluded such testimony as speculative, and the trial judge in this case erred in allowing it to come in.

CONCLUSION

The Defendants-Respondents' argument is fraught with legal inconsistencies. There is no legal comparison between the cases at bar and the Friberg case. In the Friberg case, a Complaint was filed, and because of the long delay which occurred before the case came to trial, and the substantial increase in land values during this seven year delay, and the fact that the Defendants reserved their right to challenge the State's right to condemn and didn't draw down on the money, the Friberg Defendants were given the later trial date. None of the foregoing facts exist in the cases at bar.

The EIS was approved in 1977, but additional approvals and funding were required. The actual alignment of the freeway had to be designed with respect to each landowner involved. The final design would not have been available until shortly before December, 1985. Also, funding would have to occur which did not take place until December, 1985. If UDOT is required to purchase the necessary property as soon as the alignment corridor is

known, this creates an impossibility for UDOT. The design with respect to each individual landowner is not known until there is a final design. Also, if UDOT doesn't have the necessary funding, it cannot commence construction as required by Utah Code Ann. § 78-34-19 (1987).

If these Defendants-Respondents succeed, it will mean that every time a condemnation is filed, there will have to be a second trial to determine the date of valuation. The Defendants-Respondents being able to choose the date of valuation as any time the land values were the highest between when the corridor is announced and when the case comes to trial.

That if the Defendants-Respondents' property was taken and/or damaged in 1977, this created a cause of action which the statute of limitations has run and the Governmental Immunity Act was not complied with.

The Defendants-Respondents are only entitled to statutory interest from and after the date this Court granted an order of occupancy. The cases cited do not allow interest to run from the date of valuation. There is no evidence that either the Springer or Laygo property owners sought building permits. The Springer property had the same highest and best use with or without the interstate project. The Laygo property owners did not even pursue developing the portion of their property that was not being considered by UDOT for the interstate project.

None of the Defendants-Respondents have raised in any

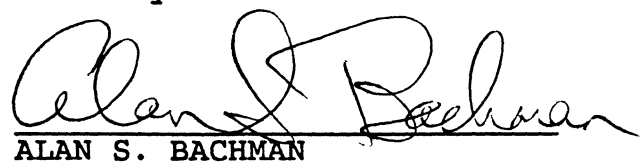
pleading filed with this Court and/or the pretrial held in this case any issue relating to a different valuation date or the date when the statutory interest should commence to run. It would be extremely unjust and "unfair" to require a 1977 date of valuation. There is absolutely no statutory basis to require the Plaintiff to pay statutory interest from the date of valuation.

Finally, the Defendants-Respondents have failed to show that land values were substantially higher in 1977 than in 1986-87. In fact, the land values were actually higher in 1982-83 than in 1977. The most the Defendants-Respondents have shown is that in 1977 there was a greater demand for lots in the Richfield area and therefore, the lot absorption rate would have been greater.

Based upon the foregoing, the dates of valuation in these cases should be the service of summons and interest should commence to run only from and after the dates the Court granted the Plaintiff-Appellant's Orders of Immediate Occupancy.

Respectfully submitted this 1st day of August, 1989.

R. PAUL VAN DAM
Attorney General



ALAN S. BACHMAN
Assistant Attorney General
Attorneys for Appellant

CERTIFICATE OF MAILING

This is to certify that two copies each of the foregoing Brief of Appellant was mailed first class, postage prepaid, to the following this 1st day of August, 1989:

Ken Chamberlain
Tex R. Olsen
Kay L. McIff
Attorneys for Defendants-Respondents
225 North 100 East
Richfield, Utah 84701